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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22 CR 305 (JMF)

5 NATHANIEL CHASTAIN,

6 Trial

7 Defendant.

8 -----x

9 New York, N.Y.
10 April 24, 2023
11 9:30 a.m.

12 Before:

13 HON. JESSE M. FURMAN,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
18 Southern District of New York

NICOLAS ROOS

THOMAS S. BURNETT

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20 BY: DAVID I. MILLER

DANIEL P. FILOR

21 CHARLES BERK

22 NICHOLAS BARNES

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(In open court; case called)

MR. ROOS: Good morning. Nicholas Roos, Thomas Burnett, Allison Nichols, and Grant Bianco for the United States Attorney's Office.

THE COURT: Good morning.

MR. MILLER: Good morning, your Honor. David Miller, Daniel Filor, Charles Berk, Nicholas Barnes from Greenberg Traurig on behalf of Nathaniel Chastain, who is sitting at counsel's table.

THE COURT: Good morning. The case will be on trial beginning today. For now, folks are seated wherever they want to sit, that's fine, but when we get a jury here, I am going to ask everybody seated in the back to move as far to the back as possible, to ensure that the jurors can sit in the first few rows.

We have a handful of things to cover, and whenever we get a jury, we will proceed with jury selection.

So, first, I got some filings over the weekend. The defendant had filed an additional motion in limine regarding essentially the propriety of questions about whether -- opinion testimony, if you will, regarding whether and to what extent the information at issue was viewed as confidential. The government filed its response I guess yesterday. That's docket no. 98.

Long story short, I'm inclined to agree with the

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1 government, but bottom line, I think that this issue can be
2 addressed at trial through specific objections to particular
3 questions. That is to say, I think the government recognizes
4 the things that are probably off limits, but I certainly think
5 that some of the evidence is relevant and admissible, given
6 whether OpenSea treated the information as confidential is
7 certainly something the government is entitled to prove and the
8 defense is entitled to counter. We'll take this up based on
9 specific objections at trial.

10 MR. FILOR: Can I be heard briefly on that issue?

11 THE COURT: Sure.

12 MR. FILOR: As your Honor is aware, there are two
13 issues raised the motion. One is with respect to contract
14 interpretation, the Court's already ruled that defense
15 witnesses or other employees who signed that same contract
16 shouldn't be able to speak about contract interpretation or
17 clarity. We believe that ruling should apply to both sides,
18 including potentially the first witness who is going to speak
19 or the first or second witness that the government has
20 identified, Ms. Idowu, who is a junior member of the company.
21 She certainly should not be interpreting a contract if the
22 senior leaders of the company, for instance, Jessica Phan, who
23 was on the defense witness list, is not permitted to.

24 Your Honor, the second issue is with respect to
25 describing the conduct. And we already understand from the

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1 judge's ruling that Mr. Finzer shouldn't talk about whether he
2 thought it was insider trading. He did not. Lots of people
3 did not think it was illegal. There is one person from the
4 3500 who did think it was illegal, and again, that's this first
5 witness or second witness.

6 THE COURT: I think that issue is a non-issue. The
7 government acknowledges it doesn't intend to elicit from any
8 witness whether in their opinion it was legal or illegal. That
9 would not be proper testimony.

10 MR. FILOR: Related to that, Ms. Idowu said she was
11 concerned when she learned about this. She was concerned
12 because she thought it was illegal. So, the government's
13 papers suggest that they are going to ask her, Were you
14 concerned.

15 That's not appropriate, your Honor, for the same
16 reasons that asking the defense witnesses whether the conduct
17 was appropriate, ethical, wrongful, is not appropriate. There
18 is no relevance to her testimony, Ms. Idowu's testimony, that
19 she was concerned. That's not a relevant issue in the case,
20 your Honor. She is not speaking on behalf of OpenSea, and
21 she's not even an OpenSea employee. She was a low-level
22 employee for a short time that overlapped with the defendant
23 for a month.

24 THE COURT: So, that may be true. As I understand it,
25 and I don't know if the government's argument pertains to that

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1 witness, it may be that how a witness viewed the conduct is
2 necessary to explain actions that they took, in which case I
3 think it might be admissible for that purpose. But in any
4 event, I think we can address this in trial through objections.

5 MR. BURNETT: I can speak very briefly on what we will
6 be asking her. Ms. Idowu was a person who is in charge of
7 running the social media for the company. So, the night when
8 the Twitter allegations came out about Mr. Chastain's conduct,
9 she saw it, and sent those messages to, like, an escalation
10 channel to management. The government plans to elicit the
11 story about her escalating it to management, but not get into
12 whether or not she thought it was illegal or not. I don't
13 think we are not going to get deep into why she was concerned
14 about anything. But we will ask her why -- we will prompt her
15 to say that she escalated this to management, which might
16 elicit her to say she was concerned about the tweet, but not
17 get into details about why.

18 MR. FILOR: Your Honor, the only related note on that
19 topic is she said in her 3500 she didn't think it was moral,
20 and she thought there might be a contract interpretation. She
21 should not be getting into any of those issues, your Honor.

22 THE COURT: Doesn't sound like she will.

23 MR. BURNETT: She's not.

24 THE COURT: Again, I'll take as it comes, but I think
25 you should have a general understanding of the parameters and

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1 lines here based on my prior rulings.

2 The second issue pertains to the curative instruction.
3 Both sides put in the their submissions last night. I've
4 reviewed those, and first as to the victim question, I'm
5 inclined to agree with the government which is to say I'll wait
6 and see. If I think, based on either openings or evidence at
7 trial, it's appropriate, then I may well give a curative or
8 explanatory instruction on that front. We can discuss at the
9 charge conference whether anything of that sort is appropriate
10 in the final instructions. But right now, I'm not sure it will
11 be necessary. And I think the government's argument that I
12 should wait and see whether terms and the like are used makes a
13 lot of sense.

14 As for the curative instruction on "insider trading,"
15 there is a question in the voir dire questionnaire that you'll
16 be getting in short order that I think amounts to a form of
17 curative instruction, but in a more neutral manner. I think
18 the government's concerns here are fair, which is to say if
19 they use the term in their opening, and I jump in and say, just
20 to be clear, the defendant is not charged with insider trading,
21 that it could suggest an impropriety on the government's part
22 in using the term, and I have already ruled there is no
23 impropriety because it is, as I've said, not inapt.

24 So I think a more neutral way of handling this is
25 appropriate. There is a question, again, you'll see the

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1 questionnaire in short order, but it says: As I mentioned, at
2 the end of the trial, I will give you thorough instructions on
3 the applicable law, including what the government must prove
4 beyond a reasonable doubt for you to find the defendant guilty
5 of the crimes with which he is charged, namely wire fraud and
6 money laundering. Do you have any doubt that you will be able
7 to follow my instructions as to the law and disregard any
8 opinions you may have about such terms as "fraud,"
9 "confidential business information," "money laundering" or
10 "insider trading" that may be used during the trial.

11 I think, number one, that puts it in the context of
12 various terms that may be used and heard during trial, and in
13 that sense doesn't call undue attention to any one in
14 particular, insider trading one in particular. Number two, I
15 think my inclination is that suffices. That's a form of
16 curative instruction, and paired with potentially having an
17 instruction in the final charge probably does away with the
18 need for one during the trial that would only call undue
19 attention to it, and also potentially suggest impropriety where
20 there is none. That's my inclination. But do you wish to be
21 heard?

22 MR. MILLER: Yes, Judge. First, on the victim
23 curative instruction. We actually think that this is going to
24 come up pretty quickly, based on one of their two witnesses
25 they identified last night, a man by the name of Mr. Salmon,

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1 who was a person in the marketplace, and I suspect there is
2 going to be a lot of testimony about the feature arts process,
3 and buying and selling NFTs, and perhaps even this witness's
4 view as to what happened, namely, the facts of this case.
5 Again, we think there is a substantial likelihood that the jury
6 is going to get confused by this issue.

7 We are not suggesting that "level playing field," as
8 the government was sort of suggesting in their letter last
9 night is the only thing that can trigger this. We put that in
10 there based on what we thought might be in their opening. If
11 it's not, it's not that. Doesn't mean there is not a reason
12 for that instruction. Particularly given one of their first
13 witnesses is essentially somebody in the marketplace.

14 This is a very different case than the normal
15 misappropriation insider trading case, if you will, and I'm
16 obviously not about to get into all of our arguments before.

17 What I am going to say is I don't think this has come
18 up in this context before, where you have alleged insider
19 trading -- I'll get to that in a second -- in a situation where
20 there is no financial product involved, and there is no real
21 argument as to any kind of fraud on the public or fraud on the
22 market.

23 So, ultimately, we think that the Court's suggestion
24 on Thursday about a curative instruction that the victim or the
25 only alleged victim is OpenSea is apt and appropriate. We

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1 think this will come up very quickly, your Honor, and we think
2 your Honor should give that instruction at some point perhaps
3 before or even after Mr. Salmon's testimony. That's with
4 respect to the victim curative instruction, your Honor.

5 THE COURT: So, let's pause there. I'll take it under
6 advisement. I hear you, and if I think, based on Mr. Salmon's
7 testimony that there is any potential confusion, I will not
8 hesitate to give a neutral instruction that focuses the jury on
9 what the issue is, and I'll make my decision then.

10 MR. MILLER: Understood, your Honor.

11 As for insider trading, given the novelty of this
12 situation, and we expect the government to open on insider
13 trading and certainly we are going to mention this because this
14 will come up, we are not saying that your Honor should give a
15 curative instruction during the government's opening or even
16 after the government's opening. Your Honor can give the
17 curative instruction after both openings, which would be an
18 appropriate time, given the nature of this case, the novelty of
19 this case, and that insider trading has, as far as we
20 understand it, never been charged this way before.

21 THE COURT: All right. I'll take that under
22 advisement as well. I should say if something happens at trial
23 that I think could cause confusion on any issue, I will not
24 hesitate to give what I think is an appropriate curative
25 instruction. So if based on the openings or any other evidence

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1 at trial I think that the question of insider trading warrants
2 a curative instruction, I will certainly give it. It will be a
3 more neutral one.

4 Right now I am inclined to think the combination of
5 questions that I am going to pose during voir dire and
6 potential instruction and final instructions, where obviously
7 the jury will be instructed quite clearly on what the crimes
8 are and what the elements of those crimes are, that those
9 suffice. But I will keep that in mind as well.

10 MR. MILLER: Thank you, Judge.

11 THE COURT: All right. Next, just to make a record on
12 something after the final pretrial conference, I noticed that
13 in the government's request to charge there was a question --
14 sorry, not request to charge. Proposed voir dire there was a
15 question about venture capital and jurors' views on that. And
16 I had my clerk inquire of counsel as to what the reason was for
17 that. The answer we were given, just to make a record on that,
18 is that there may be testimony that the confidentiality
19 agreement signed by Mr. Chastain came from a template, one of
20 OpenSea's investors a venture capital firm recommended, another
21 government's expected witness formerly worked for a venture
22 capital firm.

23 I did not include anything in connection with venture
24 capital in the voir dire. Number one, I think that's a fairly
25 tenuous connection. Number two, without explaining to the jury

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1 what the relevance of the venture capital is, and I'm not
2 inclined to think that's appropriate, gives undue attention to
3 one particular piece of fact here, I don't think it make sense
4 to ask as an abstract matter their views on venture capital,
5 because they don't have any idea what relevance it has. I am
6 not including it.

7 It did prompt me to look at the government's witness
8 list, and just as a disclosure, I see and I don't know if this
9 is the relevant person, but there is a Kathryn Haun on the
10 government's witness list. Just to disclose, Ms. Haun and I
11 were colleagues in the Attorney General's Office in 2007 to
12 2009. I have not had any contact with her since. No reason
13 that should affect my ability to judge this matter, but just
14 wanted to make a record on that front as well.

15 I did get one additional name for voir dire, Megan
16 Sheffield. It's not on the printed questionnaire because that
17 went to press before that name was given to me, but I will just
18 add that orally to the jury pool.

19 MR. FILOR: Thank you, your Honor.

20 THE COURT: You were supposed to exchange any
21 demonstratives last night and alert me if there were any
22 disputes.

23 MR. ROOS: So, your Honor, I think there is -- I think
24 we have no objection to the defense ones. I think there is one
25 dispute on one of the government's slides related to its use of

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1 a like a picture of dollar signs as opposed to like a
2 cryptocurrency icon. I can give your Honor a copy and I'll let
3 the defense articulate their objection.

4 THE COURT: Please give me a copy. And Mr. Miller?

5 MR. MILLER: Your Honor, it is more than just a dollar
6 bill sign, because we understand that can signify money and
7 obviously we could talk about that. But actually it looked
8 like a dollar bill that was going from Mr. Chastain to purchase
9 the NFTs. And we think that's confusing, it is just completely
10 inaccurate since this involves crypto. It doesn't involve a
11 dollar. And this is not a trivial point, your Honor.

12 THE COURT: All right.

13 MR. ROOS: May I approach?

14 THE COURT: Yes. Do you want to explain? Seems to me
15 it is just a metaphor for payment.

16 MR. MILLER: Your Honor, again, there is going to be
17 testimony with respect to what the applicable cryptocurrency
18 Ether or Eth was worth at particular points, and frankly how
19 much money was involved in this case which we dispute. We
20 think there is good grounds to dispute. And if so we are
21 concerned --

22 THE COURT: Let me interrupt you. Do you dispute that
23 Ether is translatable into dollar currency, into U.S. currency.

24 MR. MILLER: I don't dispute it can be sold and
25 obtained, bought for fiat currency. It wasn't in this case.

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1 THE COURT: I understand, but at any given time it is
2 worth some amount of U.S. currency.

3 MR. MILLER: Yes. Although, respectfully, that value
4 can fluctuate across platforms etc. But yes.

5 THE COURT: I think this is fine, and I don't think at
6 the end of the trial that the jury will have any confusion, let
7 alone confusion caused by this.

8 Do you want this back, Mr. Roos?

9 MR. ROOS: Only if your Honor doesn't want it.

10 THE COURT: I can throw it in the garbage, so I will
11 keep it here. I take it no other disputes on that score.

12 I think I have exhibits, 3500 material and 26.2
13 material from both sides. Mr. Roos, you look there is an issue
14 on that front.

15 MR. ROOS: No issue. I was going to let your Honor
16 finish your thoughts. I was going to say we sent over a
17 Microsoft Word version of our exhibits. I didn't see exact
18 guidance on what you were looking for, so we put together
19 something, but if your Honor has a preference of a different
20 format or additional information, please let us know.

21 THE COURT: That's fine. Just a reminder, this is not
22 reflected in my rules because I haven't updated them, but I do
23 want a running list each day, that is to say, you guys should
24 consider and make sure you agree what has or hasn't come into
25 evidence as the case may be, and submit that to me either the

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1 night before or each morning. Just to make sure everybody's on
2 the same page as to what is in evidence.

3 I think there is a high school class that has come to
4 observe, so while they get seated. I'll pause for a moment.
5 Anything else the government has to raise?

6 MS. NICHOLS: Just briefly, your Honor. I wanted to
7 alert the Court that since our conference on Thursday, the
8 government has interviewed Mr. Salmon again. And among other
9 things has learned that the correct pronunciation of his name
10 has become Americanized to be like the fish.

11 Mr. Salmon no longer recalls that the follow up
12 conversation that he had with a member of OpenSea, after his
13 NFT was featured on the home page, was in fact Mr. Chastain.
14 He think it might have been Mr. Chastain or it might have been
15 another representative of OpenSea. So in light of the fact I
16 had made a proffer of proof to the Court about the expected
17 relevance of his testimony, I wanted to alert the Court to that
18 change in between the government's interviews of him.

19 We do still think that his testimony is relevant and
20 probative for the other reasons that I had proffered. He is an
21 artist. He can talk about the process for making digital art
22 and NFTs and listing them on OpenSea's website, which is all
23 directly relevant to the facts at issue here. He can talk
24 about the import to him as an artist of getting featured on
25 OpenSea's website, and he's expected to speak about how the

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1 impact of being featured increased the price of his art. He's
2 also expected to say that he did not have any conversation with
3 any member of OpenSea before his piece was selected to be
4 featured, which is relevant to the issue of that information
5 being maintained as confidential information by OpenSea.

6 THE COURT: Okay. Anything from the defense?

7 MR. FILOR: Your Honor, briefly. So we received two
8 sets of 3500 material since last Thursday's conference. I'm
9 not totally clear whether the government intends to ask
10 Mr. Salmon about conversations that he thought could have been
11 with Mr. Chastain. We now know they certainly were not. We
12 fortunately were able to get the Clubhouse records on an
13 emergency basis over the weekend that showed that Mr. Chastain
14 was never in Clubhouse after February of 2021.

15 THE COURT: What is Clubhouse?

16 MR. FILOR: Clubhouse is where Mr. Salmon claims he
17 may have spoken to Mr. Chastain after his piece was featured,
18 and you recall the government's kind of creative argument that
19 because Mr. Chastain didn't tell him certain things, that
20 should go to motive or concealment or something. In fact, the
21 conversations never happened, and I can hand up the Clubhouse
22 records. To the extent the government would try to elicit
23 conversations with Mr. Chastain that never happened, it sounds
24 like it was with Matt. We think we know who Matt is. He is on
25 the defense witness list. He worked as a community manager

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1 doing things like participating in Clubhouse discussions.

2 So I wanted to make it clear the government should not
3 be asking Mr. Salmon if it's possible that he spoke to
4 Mr. Chastain, and Mr. Chastain neglected to tell him things.

5 THE COURT: Let me stop you because this may be a moot
6 point. Can I ask the government if you intend to elicit that
7 communication, since it sounds like you are no longer certain
8 it was with the defendant.

9 MS. NICHOLS: No, your Honor.

10 MR. FILOR: Thank you, your Honor.

11 The only other thing I would raise is we don't think
12 it's relevant and it shouldn't be brought up any kind of mental
13 conditions, autism or the like, that the witness has. It is
14 not relevant to this case. It shouldn't be part of the
15 testimony, your Honor.

16 THE COURT: Okay.

17 MS. NICHOLS: We don't anticipate asking any questions
18 about the defendant's -- or sorry, the witness's health. I
19 haven't advised him not to raise that, your Honor, so I guess I
20 can't say that it absolutely would not be something that he
21 would mention. And the only reason I could imagine is that I
22 know that he has donated work, donated a piece of art to raise
23 money for autism research. And I don't intend to ask him about
24 that, but I am alerting the Court and the parties that that
25 might be a way where it could come up.

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1 THE COURT: All right. Lest anyone have concerns, I'm
2 capable of ruling on objections in real time. So you are
3 welcome to make an objection at trial to any question you think
4 is objectionable, and I will give you a ruling at that time.

5 MR. FILOR: Of course. Thank you, your Honor.

6 THE COURT: Anything else from the defense?

7 MR. MILLER: Just briefly, your Honor. Not an
8 objection or anything. Just so your Honor is aware, during
9 voir dire we intend to have a consultant named Julie Blackman
10 who will be seating in the fourth seat here.

11 THE COURT: I don't think you gave me her name as one
12 that would be --

13 MR. MILLER: I think she is on the list, your Honor.

14 THE COURT: Forgive me. She is indeed so no issues.

15 All right. If that covers everything, I think we're
16 good until we get a jury pool, and I'll try to find out when
17 that will be. But that's a bit of a black box and I don't
18 know. It could be a matter of minutes, it could be in a little
19 bit of time. I don't know.

20 Tell you what. Just because I don't want the students
21 who came to get nothing out of their experience here, I'm happy
22 to talk to them informally and off the record. If you guys
23 want to vacate counsel table, and then when we are ready to go
24 I'm happy to go from there. With that, we'll adjourn until we
25 have a jury pool or shortly before we have a jury pool.

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1 (Recess)

2 (Voir dire under separate cover)

3 THE COURT: We're not going to start with openings
4 today, given the time. It is late, it's been a long day, and I
5 want to make sure you all can focus and give proper attention
6 to the lawyers and then to the evidence. But, I do want to
7 make the most of our time, so I am going to give you some
8 preliminary instructions now, and then we'll break for the day
9 and pick up promptly tomorrow morning with opening statements
10 and begin with the rest of the case.

11 This case is now officially on trial. As I stated
12 earlier, the trial is expected to last up to two weeks. It may
13 or may not last that long.

14 I will certainly make you two promises: One is I'll
15 do my level best and use all of my powers, and I tell you
16 they're considerable powers, to make valuable use of your time
17 and get you back to your regular lives as quickly as I can.
18 Number two is I will try to the best of my ability to keep you
19 advised of where things are, whether we're keeping to schedule
20 and where things stand. That, too, is more art than science,
21 but I'll do my best. But bear with me, and trust I'll do
22 whatever I can to make valuable use of your time.

23 Until we get to summations and deliberations, and I
24 will certainly give you as much warning as I can about that, I
25 will remind you we will begin each morning at 9 o'clock and we

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1 will close each day at 2:30 with one and only one half hour
2 break in the middle of the day.

3 To help ensure we start on time, I am going to ask you
4 be in the jury room, and Ms. Smallman, when we conclude today,
5 will show you where that is and how to get there. And I want
6 to stress now when you come here tomorrow, you will not enter
7 the courtroom the way you've been coming in and out. You are
8 going straight into the jury room and don't come into the
9 courtroom.

10 I am going to ask you to be in the jury room by 8:45,
11 no later than 8:45, and ideally even earlier, so we can begin
12 without delay. I want to stress we cannot begin until all of
13 you are here. So if you're late, it's not only going to
14 inconvenience all of us, meaning we can't start, but it will
15 also inconvenience all of your fellow jurors. So please do
16 your best to ensure that every day you're here on time and no
17 later than 8:45 so we can start promptly.

18 And to entice you to be on time, I have arranged for
19 some breakfast and coffee each morning in the jury room. So
20 hopefully, knock on wood, if that goes according to plan,
21 you'll find some things to greet you.

22 But please be there early. If you are traveling from
23 far away, and I know some of you are, please plan accordingly.
24 Next couple days in particular as you are getting used to what
25 the commute involves, just make sure you leave plenty of time

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1 in case there are any hiccups along the way.

2 Bottom line is please be in the jury room no later
3 than 8:45, and ideally earlier, so we can start promptly. And
4 again, we'll end each day until we get to summations at 2:30
5 with one and only one half hour break.

6 Given how short that break is, you are not going to be
7 able to leave the jury room for the break so you should plan
8 accordingly. usually there is enough snack from the morning to
9 feed you at the break too, but I would urge you, encourage you
10 to bring a snack or a small lunch or something to tide
11 yourselves over until the end of the day.

12 Let me also give you some advice based on experience.
13 It is a good idea to use the bathrooms before you come out for
14 trial. My hope is we can make it through each session without
15 the need to take bathroom breaks, because my goal here is not
16 to torture you. I assure you. And if anyone is having a
17 serious problem, you should certainly raise your hand. But the
18 problem is if we take a break, with the number of people we
19 have and the number of moving parts we have, what seems like it
20 should be only a two minute break becomes a 15 minute break,
21 and all of a sudden my promise to you to make the most of your
22 time becomes a lot more difficult for me to keep. So, try and
23 use the bathrooms just before you come out so you can make it
24 the whole time. But again, if you have any trouble, you can
25 obviously let me know.

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1 Let me give you some instructions about your duties as
2 jurors. As I told you this morning, at the end of the trial, I
3 will give you more detailed instructions, and it is those
4 instructions that will control in your deliberations in this
5 case. But for now, let me explain how the trial will proceed.

6 The first step, as I alluded to earlier, will be the
7 lawyers' opening statements. The government will make an
8 opening statement. And after that, I expect the lawyers for
9 the defendant to make an opening statement as well, but they
10 are not required to do so. The reason for that is that at all
11 times, as I mentioned this morning, the burden is on the
12 government to prove the defendant's guilt beyond a reasonable
13 doubt. The defendant in a criminal trial in our country
14 doesn't have to do anything, doesn't have to present a case,
15 doesn't have to do anything. The burden is at all times on the
16 government.

17 In any event, whoever makes opening statements, those
18 statements are not evidence. All right. They serve no purpose
19 other than to give you a preview, an idea in advance of the
20 evidence that the lawyers expect you to hear from the
21 witnesses. The statements permit the lawyers to tell you a
22 little bit about what the case is about. But, the only
23 evidence comes from the witnesses and the exhibits that are
24 admitted into evidence.

25 After opening statements, the government will present

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1 its evidence, its case in chief. The government's evidence
2 will consist of the testimony of witnesses, as well as
3 documents and other exhibits. The government will examine its
4 witnesses, and the defense, the defendant's lawyer may
5 cross-examine them.

6 Following the government's case, the defendant may
7 present a case, if he wishes to do so. Again, because of the
8 presumption of innocence, the defendant is not required to
9 offer any proof, not required to call any witnesses, and not
10 required to testify. If the defendant does present a defense
11 case, however, the defense witnesses will testify, and the
12 government would have an opportunity to cross-examine them.

13 After the presentation of evidence is completed, the
14 parties will deliver their closing arguments to summarize and
15 interpret the evidence for you. Just as the parties' opening
16 statements are not evidence, their closing arguments are not
17 evidence either.

18 Following closing arguments, I will give you my
19 instructions on the law, and you will retire to deliberate on
20 your verdict, which must be unanimous, and must be based solely
21 on the evidence presented at trial, and my instructions about
22 the law. Your deliberations are secret. You will never have
23 to explain your verdict to anyone.

24 Under the law, a defendant in a criminal case, as I've
25 mentioned a couple times but will mention more during trial, is

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1 presumed innocent and cannot be found guilty of the crimes
2 charged unless a jury, after having heard all of the evidence
3 in the case, unanimously decides that the evidence proves the
4 defendant guilty beyond a reasonable doubt.

5 In a criminal case, as I've said, the burden remains
6 with the prosecution, the government, at all times. For the
7 jury to return a verdict of guilty as to the defendant, the
8 government must prove that the defendant is guilty beyond a
9 reasonable doubt. A person charged with a crime has absolutely
10 no burden to prove that he or she is not guilty, and if the
11 defendant chooses not to present any proof, that decision
12 cannot be held against him, and may not enter into your
13 deliberations at all.

14 I will, however, instruct you more fully on the burden
15 of proof after all the evidence has been received.

16 Let me briefly explain the jobs that you and I are to
17 perform during the trial. I will decide the rules of law that
18 apply to this case. I will decide that by making legal rulings
19 during the presentation of the evidence. And also, as I've
20 said, in giving you the final instructions after the evidence
21 and arguments are completed.

22 In order to do my job, I may have to interrupt the
23 proceedings from time to time to confer with lawyers about the
24 rules of law that should apply here. Sometimes we will talk
25 here at the sidebar, as you saw us do during jury selection,

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1 but some of the conferences may take longer than others. And
2 so as a convenience to you, I may excuse you from the
3 courtroom.

4 I try to keep those interruptions to the absolute
5 minimum, and ideally none at all, but please be patient, and
6 understand if we are interrupting in that manner, that these
7 conferences are both necessary to ensure the fairness of the
8 trial, and also often serve to make the trial go more quickly.

9 While I decide the law that applies to this case, you,
10 members of the jury, are the triers of fact. You will weigh
11 the evidence presented and decide whether the government has
12 proved beyond a reasonable doubt the defendant is guilty of
13 each charge in the indictment.

14 You must pay close attention to all of the evidence
15 presented, and you must base your decision only on the evidence
16 in the case and my instructions about the law. As I've said
17 now a few times, and will say many more times before this case
18 is over, your decisions must be based solely on the evidence
19 that you see and hear during the trial.

20 So, what then is evidence? Evidence consists only of
21 the testimony of witnesses, documents, and other things
22 admitted as evidence or stipulations agreed to by the parties.
23 Stipulations are a fancy legal lawyer term for agreements
24 between the parties, and I'll give you further instructions on
25 that, if necessary, during the trial.

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1 Some of you may have heard the term circumstantial
2 evidence and direct evidence. Do not be concerned with those
3 terms. You are to consider all of the evidence given in this
4 trial.

5 Certain things are not evidence and must not be
6 considered by you. The following is a list of what is not
7 evidence. First, arguments, statements and questions by the
8 lawyers are not evidence, nor are the statements that I make or
9 the questions that I ask of a witness.

10 Second, objections to questions are not evidence. The
11 lawyers have an obligation to make an objection if they believe
12 that evidence being offered is improper under the rules that
13 apply in federal court. You should not be influenced by the
14 objection nor by my rulings on an objection. If an objection
15 is sustained, you should ignore the question, and any answer
16 that may have been given. If an objection is overruled, you
17 should treat the answer as you do any other. If you're
18 instructed that some item of evidence is received for a limited
19 purpose only, you must follow that instruction.

20 Third, testimony that I excluded or told you to
21 disregard is not evidence, and must not be considered. And
22 fourth, anything you may have seen or heard outside the
23 courtroom is not evidence, and must be disregarded. You are to
24 decide this case solely on the evidence presented here in the
25 courtroom.

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1 There is no formula to evaluate testimony or exhibits.
2 For now, suffice it to say you bring with you into this
3 courtroom all the experience and background of your lives. Do
4 not leave your common sense outside the courtroom. The same
5 types of tests that you use in your every day dealings are the
6 tests that you should apply in deciding how much weight, if
7 any, to give to the evidence in this case.

8 The law does not require you to accept all of the
9 evidence admitted at trial. In determining what evidence you
10 accept, you must make your own evaluation of the testimony from
11 each of the witnesses and the exhibits that are received in
12 evidence.

13 It is essential, however, that you keep an open mind
14 until you have heard all the evidence in the case. And I
15 assure you, you will hear me remind you about that throughout
16 the trial many, many times. A case can be presented only step
17 by step, witness by witness, before all the evidence is before
18 you. As you know from experience, you can hear one person give
19 his or her version of an event and think it sounds very
20 impressive or even compelling, and yet, upon hearing another
21 person's version of the very same event or even the same person
22 cross-examined about that event, things may seem very
23 different. In other words, there may be another side to any
24 witness's story.

25 You should use your common sense and good judgment to

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1 evaluate each witness's testimony based on all of the
2 circumstances. Again, I cannot emphasize too strongly, you
3 must keep an open mind until the trial is over and your
4 deliberations begin. You should not reach any conclusions
5 until you have all of the evidence before you.

6 Under your oath as jurors, you are not to be swayed by
7 bias or sympathy. All of us, no matter how hard we try, tend
8 to look at others and weigh what they have to say through the
9 lens of our own experiences and backgrounds. We each have a
10 tendency to stereotype others and make assumptions about them.
11 Often you see life and evaluate evidence through a clouded
12 filter that tends to favor those like ourselves. You must do
13 the best you can to put aside such stereotype for all litigants
14 and witnesses are entitled to a level playing field in which we
15 do the best we can to put aside our stereotypes and prejudices.
16 You are to be guided solely by the evidence in this case, and
17 my instructions about the law.

18 Finally, let me caution you about certain rules and
19 principles governing your conduct as jurors in this case.
20 First, as I mentioned earlier, you must not talk to each other
21 about this case or about anyone who has anything to do with it
22 until the time comes at the end of the case, and you go to the
23 jury room to begin your deliberations. The reason for this
24 requirement is that you must not reach any conclusion on the
25 charges until all of the evidence is in. In other words, as

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1 tempting as it may be when you go back to the jury room to talk
2 about what you just saw and about what's going on in the case,
3 resist that temptation. Part of keeping an open mind is not
4 talking to one another and forming judgments until you have all
5 of the evidence before you. And as I've said, keep an open
6 mind until you start your deliberations at the end of the case.

7 Second, do not communicate with anyone about this case
8 or with anyone who has anything to do with it until the trial
9 has ended and you have been excused as jurors. "Anyone else"
10 includes members of your family and friends, including your
11 employers, includes your co-employees.

12 Let me tell you, I know some of you have an employment
13 concern. If you would like me to contact any employer to just
14 explain that you have been seated as a juror, and ask for their
15 accommodation while you serve as a juror, I'm happy to do so.
16 Just tell Ms. Smallman when you go to the jury room, and I'm
17 certainly happy to ensure that you don't have any trouble on
18 that front.

19 But, bottom line is don't communicate with anyone
20 about this case. You can tell your family, friends, employer
21 that you have now been seated on a federal criminal trial.
22 Don't say the name of the case, don't say what the case is
23 about, don't name anyone involved in the case, don't say
24 anything else about it. All right.

25 And when I say no communicating about the case, it

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1 means no communicating on Facebook, Twitter, Google, Snapchat,
2 Instagram, blog, standup comic routines, in person, telephone,
3 anything at all. Whatever.

4 You may think that tweeting something about the case
5 or posting something about it on Facebook is either harmless or
6 no one will find out, but I assure you that is not the case.
7 And if you do anything like that, it will be a major
8 inconvenience to everyone involved in the trial, including or
9 especially to you, so don't do it.

10 Third, do not let anyone talk to you about this case
11 or about anyone who has anything do with it. If any person
12 should attempt to communicate with you about this case at any
13 time during the trial, either in or out of the courthouse, you
14 must immediately report that to my staff, either Ms. Smallman
15 whom you've seen this morning, or my law clerk Mr. Miller, who
16 is standing over there, and to no one else. When I say report
17 that communication to no one else, I mean you should not tell
18 anyone, including your fellow jurors. Just tell Ms. Smallman
19 or Mr. Miller.

20 To minimize the probability of any such improper
21 communication, it is important, as I said earlier, that you go
22 straight to the jury room when you come in in the morning. So
23 don't come into the courtroom. All right. You are going to go
24 straight into the jury room, and Ms. Smallman will ensure you
25 know where that is. It is important you go straight there,

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1 that you remain in the jury room for the duration of the trial
2 day, and you head directly out of the courthouse at the end of
3 the trial day. Don't linger on this floor or in the lobby or
4 any other public areas of the courthouse for that matter. And
5 you should use the bathrooms in the jury suite. There are a
6 couple of bathrooms that are back there just for you. Use
7 those and don't use the bathrooms that are elsewhere in the
8 courthouse.

9 You may not, as I mentioned earlier, use the
10 cafeteria. Don't linger anywhere in the public areas of the
11 courtroom.

12 Fourth, do not do any research or any investigation
13 about the case or about anyone who has anything to do with the
14 case. Don't go visit any place described during the trial.
15 Don't read or listen to any news reports about the case. There
16 may or may not be any, but if you happen to come cross or hear
17 anything, immediately turn the channel, change the station,
18 turn the page, make sure you don't read or are not exposed to
19 anything about the case.

20 Don't go on the internet or use whatever digital
21 communications device it is you use to see what you can learn
22 to inform yourselves about this matter or about anyone involved
23 in it. The time will come where you can do that, but that time
24 is not until you are formally excused as a jury, and that again
25 is to ensure your decision in this case is based solely on the

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1 evidence presented at the trial. In other words, all that
2 you'll need to know in connection with your role in this case
3 will be presented here in open court by the parties.

4 I expect you to advise me immediately through
5 Ms. Smallman or Mr. Miller if you become aware of another
6 juror's violations of these instructions.

7 Finally, before you begin tomorrow, you will be
8 provided with a notebook and a pen. That's because I do permit
9 jurors to take notes. Some jurors hear, listen, absorb better
10 just by listening. Some it's helpful to take notes. Totally
11 up to you. Whatever would be most helpful to you to absorb the
12 evidence as it comes in. Let me stress that notes are just an
13 aid to your own recollection. The court reporters in this
14 case, as you've seen them here throughout the day, they record
15 every single word that is said in the courtroom. And any
16 portion of the testimony can be submitted to you or read back
17 during your deliberations. If you do take notes, be aware that
18 note-taking can distract you from something important that is
19 happening on the witness stand.

20 Whether or not you take notes, you should rely on your
21 own recollections and don't be influenced by the fact that
22 another juror has taken notes. If you do take notes, you
23 should, when I excuse you for the day, take your notebook into
24 the jury room. Don't leave it here in the courtroom. And then
25 leave it in the jury room each day. My staff will ensure that

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1 your notes are secured there.

2 From this point until the time when you retire to
3 deliberate, it is your duty not to discuss this case and not to
4 remain in the presence of anyone who may be discussing this
5 case. In this regard, I remind you, as I said earlier, the
6 parties involved in this case have been strictly instructed to
7 have no contact whatsoever with you. So if you happen to see
8 any of them outside of the courtroom, as you come into the
9 courthouse tomorrow, whatever, and they don't acknowledge you,
10 say hello to you, make small talk with you, smile at you,
11 anything, please don't take offense. They are not being rude.
12 They are simply following my instructions. All right.

13 That concludes my preliminary instructions. In a
14 moment I will excuse you, and Ms. Smallman is going to take you
15 into the jury room to show you where that is and how to get
16 there tomorrow morning. She's also going to get some contact
17 information from you to ensure we can contact you in the event
18 we need to. She'll give you some contact information from us
19 to ensure that you know how to get in touch with us if need be.

20 Again I remind you, please, please be here by no later
21 than 8:45 tomorrow. If something unexpected happens and you're
22 running late, please contact us through the means that
23 Ms. Smallman will give you to let us know so we can plan
24 accordingly. And I remind you we can't start until you're all
25 here. At a minimum you'll have a means to contact us if you

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1 ever need to reach us.

2 Ms. Smallman will also give you I think a juror
3 placard or ID which you can use to get into the courthouse
4 tomorrow. If you flash that to the court officers, they will
5 expedite you through security and it will speed your entry into
6 the courthouse. Hopefully it won't be too busy at the time you
7 are arriving, but you can let them know you are a sitting juror
8 in a case and they will facilitate your entry.

9 A few final reminders before I excuse you for the day,
10 and again, you are going to follow Ms. Smallman out to the jury
11 room and she will give you some further instructions and get
12 your contact information there.

13 Number one, keep an open mind. You've heard a little
14 bit about the case through my questions and commentary today,
15 but you haven't heard any evidence whatsoever. That will
16 happen beginning tomorrow after the lawyers' opening
17 statements. But so far you have not heard a lick of evidence.
18 So it is absolutely critical you continue to keep an open mind.
19 Also, don't discuss the case with each other or with anyone
20 else for that matter. Don't do any research about the case.

21 With that, I wish you a very pleasant evening. Please
22 be in the jury room no later than 8:45 tomorrow morning, and we
23 will start promptly when we can tomorrow.

24 Thank you very much and have a good evening.

25 (Jury excused)

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1 THE COURT: All right. So, it was a longer process
2 than I thought, but given where we were at lunchtime, I'm very
3 happy with where we ended up.

4 Anything to discuss from the government?

5 MR. ROOS: No, your Honor.

6 THE COURT: From the defense?

7 MR. MILLER: No, your Honor. Thank you.

8 THE COURT: So, please be here certainly a few minutes
9 before 9. I'll assume that there is nothing we need to discuss
10 before we start promptly at 9 with the jury with opening
11 statements. If that assumption is incorrect, you should alert
12 my staff so we can take it up as quickly as we can. But, my
13 hope is we'll have the jury in the box at 9 and ready to go
14 with opening statements.

15 There is a mobile podium over there. If you want to
16 move the podium to the front of the jury box, you're welcome to
17 do that and set up the microphone. You can speak to
18 Ms. Smallman about that in the morning. This podium here
19 cannot be moved.

20 Any questions?

21 MR. MILLER: Your Honor, not related to that, but just
22 occurred to me. With respect to the privilege submissions that
23 are supposed to be made under seal by 11:59:59 this evening,
24 can we do so by sending it by e-mail to your Honor? How would
25 you prefer that we handle that?

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1 THE COURT: So I don't think we discussed anything
2 about them being sealed. But if you think that they are
3 appropriately filed under seal in the first instance, given the
4 nature of the submissions, I'm happy to take them and consider
5 your application, or consider whether they should be under
6 seal. I would say if they can be redacted, that's preferable
7 to being sealed all together. But first order of business, if
8 you think they should be sealed, you can e-mail them to my
9 chambers.

10 MR. MILLER: We don't think that the contents of our
11 application is privileged, which is part of the reason why we
12 are making that application. But obviously in deference to
13 OpenSea and their counsel, we are happy to make redactions or
14 whatever is required.

15 THE COURT: Is anyone here from OpenSea? I assume
16 not. So why don't you discuss with them. If both sides are in
17 agreement that, given the nature of the briefs, they can be
18 filed publicly, that's certainly the preference. If not, you
19 should at some point plan to address whether and to what extent
20 they can be public. If that is primarily OpenSea's application
21 to make, I'll give them an opportunity to be heard. You should
22 err on the side of caution and submit it under seal in the
23 first instance, if there is any question about whether it is
24 privileged and should be sealed.

25 MR. MILLER: Understood.

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1 THE COURT: But at present, our court rules don't
2 permit you to file things on ECF under seal in criminal cases.
3 We allow it in civil, but not yet in criminal. So you should
4 e-mail it when the time comes.

5 MR. MILLER: Thank you.

6 THE COURT: Anything else? Very good.

7 I will see you bright and early tomorrow ready to go 9
8 sharp. And with that, I wish you all a pleasant evening.
9 Thank you.

10 (Adjourned until April 25, 2023, at 9 a.m.)
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